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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1005 OF 2004

Mukund Staff & Officers' Association
a trade union registered under
the Trade Unions act, 1926,
C/o. Kamani Employees' Union,
Karson Velji Chawl, L.B.S. Marg,
Kurla, Mumbai-400 070. ...Petitioner

Vs.

Mukund Limited,
a Company constituted under
the Companies Act, 1956,
L.B.S.Marg, Kurla,
Mumbai-400 070. ...Respondent.

Mr. Susheel Mahadeshwar for the petitioner.

Mr. P.K.Rele, Sr. Counsel along with Mr. Piyush Shah for respondents.

CORAM : ANOOP V. MOHTA,J.

DATED : 22nd August, 2007

JUDGMENT:-

1. The petitioner is a trade union registered under the Trade Unions Act, 1926 and has as its members around 800 monthly rated workers employed in the respondent Company's factories at Kalwe and Kurla, Mumbai.

2. During the period 04/08/2000 to 21/11/2000 the

Company terminated the services of 20 monthly rated workers. The petitioner raised a dispute against the termination of the said 20 workers and by its order dated 10/02/2001 the Government referred the said dispute to the Industrial Tribunal, Mumbai, (for short, "the Tribunal") being Reference (IT) No. 20 of 2001. The order of Reference reads as under:-

i) The workmen whose names are mentioned below should be reinstated with full back wages and continuity of service, with effect from their dates of termination.

ii) The services of the monthly rated workmen covered by Reference (IT) No.3 of 1993 shall not be terminated without following due process of law.

3. On 04/05/2001 the petitioner filed its Statement of Claim alongwith an interim relief application in the said Reference (IT) No.20 of 2001. On 27/06/2001 the Company filed its Affidavit for opposing the interim relief application preferred by the petitioner. The said Affidavit dated 27/06/2001 has

been subsequently adopted by the Company as its Written Statement in Reference (IT) No. 20 of 2001. The Company has opposed the said Reference (IT) No.20 of 2001 on the ground that the workers concerned in the said reference are not workman as defined under Section 2(s) of the Industrial Disputes Act-1947 (for short, "ID ACT").

4. On 24/07/2003 the petitioners submitted Draft Issues in Reference (IT) No.20 of 2001. The first issue raised by the petitioner was whether the Company proves that the workman concerned in Reference (IT) No.20 of 2001 are not workman as defined under Section 2(s) of ID Act.

5. On 17/09/2003 the Company submitted Draft Issues in Reference (IT) No.20 of 2001. The first issue raised by the Company was whether the petitioners prove that the persons concerned in the Reference are workman as defined under Section 2(s) of the ID Act. The Company submitted that the said issue be tried as a preliminary issue.

6. By its order dated 26/09/2003 in Reference (IT) No.20 of 2001 the Industrial Tribunal rejected the

Draft Issues submitted by the petitioner and accepted the Draft Issues submitted by the Company. In the said order dated 26/09/2003 the Industrial Tribunal has held that it is for the petitioner to prove that the workers concerned in Reference (IT) No.20 of 2001 are workman as defined under Section 2(s) of the ID Act. The present petition is filed by the petitioner for challenging the said order dated 26/09/2003 passed by the Industrial Tribunal in Reference (IT) No.20 of 2001.

7. The learned counsel appearing for the petitioner basically has relied on the following judgments:-

1. **Seth Jeejeebhoy Dadabhoy Charity Funds and 3 others Vs. Forokh Noshir Dadachanji, 2005 (III) LLJ 716.**

2. **The President, Anantha Mahila Ashram, Kolhapur Vs. Smt. J.G. Ajagaonkar, 1996 (74) FLR 2415.**

3. **Waman Ganpat Raut Vs. Cadbury-Fry (India) (Private) Ltd. and another, 1980 (I) LLN 488.**

4. **Rallis India Ltd. Vs. State of West Bengal & Others 1983 II LLJ 293.**

5. **Shankarbhai Nathalal Prajapati Vs. Maize Products, 2002 III CLR 919.**

6. **Management of Hindustan Motors Ltd. Vs. Lakshmiah and another 2002 (93) FLR 226.**

8. The learned counsel appearing for the respondents have relied on the judgments of:-

1. **Mukand Ltd. Vs. Mukand Staff and Officers' Association, 2004 (II), LLJ 327, (Supreme Court).**

2. **V.N.S. Engineering and Services Company Vs. Industrial Tribunal, Goa, Daman and Diu and another, 1987 (II), LLN 968 (Bombay).**

3. **Northcote Nursing Home Pvt. Ltd., Bombay and Anr. Vs. Zarine H. Rahina (Dr.) (Mrs.) & Anr., 2001 (II), CLR 155, (Bombay).**

4. Arvind Anand Gaikwad Vs. Uni Abex Alloy Products Ltd. & Ors., 1988 (I), CLR 26.

9. By the impugned order, the Tribunal has framed issue No.1 as suggested by the first party company at Exh. C-16. The said issue is as under:-

> . "Does the 2nd party prove that persons concerned along with order of Reference are workmen within the meaning of Section 2(c) of the Industrial Disputes Act, 1947?"

10. Admittedly, as per the petitioner, the respondent company terminated the services of 20 monthly rated workers. By order dated 10/02/2001 the Government referred the said dispute to the Tribunal for following terms:-

> 1. "The workmen whose names below should be reinstated with full back wages and continuity of service w.e.f. their date of termination"
>
> 2. The services of the monthly rated workmen covered by Reference No. (IT) No.3 of 1993

shall not be terminated without following due process of law.

11. On 04/05/2001, the petitioner union filed its statement of claim alongwith an ad-interim relief and the company by its affidavit dated 27/06/2001 opposed and subsequently treated the same as written statement in reference No.20 of 2001. The company has opposed the said reference on the ground that the workers are not workmen as defined under Section 2(s) of ID Act. The basic averments of the affidavit are as under:-

. "I say that the Reference is misconceived, not maintainable and deserves to be rejected on the ground, inter alia, that (a) the employees whose names are mentioned under item (1) of the SCHEDULE to the reference are not 'workmen' as defined in Section 2(s) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") as they drew wages exceeding Rs.1600/- per mensem and were employed in supervisory/ managerial/ administrative capacities and exercised, either by the nature of the duties attached to the office or by reason

> of the powers vested in them, functions, mainly of a supervisory/ managerial nature and in any event, were not employed in skilled, unskilled, manual, clerical, technical or operational work".

12. The interim relief as not granted, therefore, the petitioner challenge the said in the writ petition. The petition is still pending in the High Court. Again the ad-interim order passed by the High Court. The company has preferred an appeal and which is also pending before this Court as averred.

13. However, as the challenge is very restricted as referred above, the learned counsel appearing for the parties made their respective submissions accordingly.

14. The Supreme Court of India in **Electronics Corporation of India Ltd. Vs. Electronics Corporation of India Service Engineers Union,(2006) (7) S.C.C. 330** while considering the Section 10, 2(k) and (s) of the ID Act reversed the finding of the High Court that the onus was on the persons claiming to be workman to prove that they are workmen as defined in the Act. However, it came to a peculiar conclusion

that since the preliminary issue were framed by the employer, the onus shifts to it and thereby the judgment of the High Court was set aside and as that of the tribunal was restored. The tribunal in the case held that no employer-employee relationship existed. In the result, therefore, the view of the High Court that the company should establish that there was no master and servant relationship between the parties and the members of the Union were not workmen within the meaning of the expression "workman" under Section 2(s) of the ID Act was negatived. By further observing the High Court came to a peculiar conclusion that since the preliminary issue was raised by the employer the onus shifts to it.

15. In **Bank of Baroda Vs. Ghemarbhai Harjibhai Rabari, (2005) 10 S.C.C. 792,** further observed as under:-

> . "While there is no doubt in law that the burden of proof that a claimant was in the employment of a management, primarily lies on the workman who claims to be a workman, the degree of such proof so required, would vary from case to case".

16. Therefore, prima facie the burden lies upon the workmen to establish its claim as specific disputes

have been raised against the order of termination and claimed reinstatement of full back wages and continuity of service.

17. The Division Bench of this Court in **V.N.S. Engineering and Services Company (Supra)** considering the provisions of ID Act and on issue about the employees termination that when the dispute referred at the instance of employee for adjudication by Industrial Tribunal held that the burden of proof regarding illegal termination lies on the employees, and he should approach the court. The party making such averments should lead evidence to establish it. There is nothing in the ID Act that causes the Court to depart from the general rule that he who approaches the court earlier should prove his case.

18. Therefore, unless the member of the petitioner Union prove his basic case to claim any relief being workmen as contemplated in Section 2(s) of the ID Act, the claim as raised cannot be granted to a non-workman. But if the members of such Union once proved that they are workmen within the defination under the ID Act, the entire machinery and procedure under the Act would be applicable including all such

protection and or procedure. **(Mukund) Supra**.

19. In **Mukesh K. Tripathi Vs. Senior Divisional Manager, LIC & Ors. Judgment Today 2004(7) (S.C.) 232 para 24** , it has been observed in this regard as under:- "The onus was on the appellant to prove that he is a workman. He failed to prove the same."

20. In **Arvind Anand Gaikwad (Supra)**, the Division Bench of this Court while considering the provisions of ID Act, Section 25F to 25K has observed as under:-

> . "We do not read the observation of the learned Judge as concluding that the burden in such cases is on the employer. Indeed, it is not possible to conclude that the burden is on the employer because the issue was raised by the employee and when the employer disputed that fact, then the burden to establish the negative fact cannot be lead at the door-step of the employer."

21. In **Northcote Nursing Home Pvt. Ltd. (Supra)** this Court while considering the similar issue held

that initially the burden is on the respondent employee to prove that she/he is workman under Section 2(s) of ID Act and she/he has to enter in to the witness box. As she/he as asserted positively that she/he was workman as contemplated under the ID Act and once the basic material placed on record by the workman, the respondent company required to rebut the same to prove otherwise.

22. In **A.K.Patel Vs. Indian Hotels Co. Ltd. 2005(3) Bom.C.R. 645**, while considering Section 2(s) of the ID Act, it has been further reiterated that the onus lies on employee to prove that he is workman within the meaning of Section 2(s) of the ID Act.

23. Taking note of above decisions of the Supreme Court as well as our High Court, I am also of the view that, in the facts and circumstances of the case, as the members of the petitioners union on termination, seeking relief of reinstatement, full back wages and continuity of service and as the respondent company has denied their claim, the intial burden lies upon the members of the union to prove that they are workmen as contemplated under Section 2(s) of the ID Act, because the respondent company denied the claim,

their relationship and that the members of the Union are not workmen. There is no question of putting burden on the parties to prove negative.

24. In **Seth Jeejeebhoy Dadabhoy Charity Funds (Supra)** as relied by the learned counsel appearing for the petitioner, after considering the material placed on record held that as the appellant company raised the issue about the jurisdiction, he must support the case. The initial burden to prove the ouster of the jurisdiction of the Industrial Court, therefore had put on the employer. There is no quarrel to this proposition. The issue in the present case is to whom burden lies to prove that case falls within the ambit of Section 2(s) of the ID Act or not.

25. We have not reached that stage in the present case as before leading evidence itself the tribunal has framed above issue. The parties are yet to lead their respective evidence. In said **Jeejeebhoy (supra)** itself the Division Bench has observed "In our considered view, the burden of proof must depend on the facts and pleadings of each case."

26. The said Division Bench has also considered

Mukesh K.Tripathi (Supra) and **Workmen of Nilgiri Co-op. Marketing Society Ltd. Vs. State of Tamil Nadu and ors., AIR 2004 SC 1639** referring to the Apex Court observation in para 44 as under:- " It is well settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him", **Jeejobhoy (Supra), Northcote Nursing Home Pvt. Ltd. (Supra)** were also considered and distinguished itself on the facts. Therefore, the facts and circumstances are totally distinct and distinguishable and not applicable to the present case.

27. **The President, Anatha Mahila Ashram (Supra), Rallies India Ltd., Management of Hindustan Motors Ltd, Shankarabhai Nathalal Prajapati (Supra)** are distinguishable on the facts itself. There arose no such issues. Therefore, those judgments in no way assist the petitioners and specifically in view of the above referred Apex Court judgments which are directly on the issue about the burden of proof on the workman to prove that he falls within the ambit of Section 2(s) of the ID Act.

28. In so far as **Waman Ganpat Raut (Supra)** the issue

was who should be lead the evidence first. There the company who had challenged the reference on the ground that the employee was no workman as defined in Section 2(s) of the Act, and therefore, on considering the merit of the case the Division Bench has observed that it was for the company to establish the same by evidence. Therefore, this judgment is also no way assist the petitioner. However, in view of the judgment as referred above, **Electronics Corporation of India Ltd. (Supra),** I am of the view that, in the facts and circumstances of the case, the judgment of **Waman Ganpat (Supra)** is not applicable and is therefore, distinguishable on facts itself.

29. On the contrary, in view of the judgments as referred above, I am of the view that the impugned judgment is within the framework of law and the record. The Tribunal, therefore, right in framing the above issue and decided to proceeded with the matter without treating the same issue as a preliminary issue. As noted above, all other issues are necessary to consider the rival submissions as raised by the parties. An evidence may be necessary to substantiate the basic issues as framed. It is desirable that all issues including the preliminary issues be heard and

decided together in view of **AIR 1984, SC 153, D.P. Maheshwari Vs. Delhi Administration and ors.** and **National Counsel for cement & Building Materials Vs. State of Haryana and ors. (1996), Supreme Court Cases 206.**

30. Resultantly, the petition is dismissed with no costs.

(ANOOP V. MOHTA, J.)